UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J.C. ASSOCIATES, **Plaintiff,** **v.** **FIDELITY & GUARANTY INSURANCE COMPANY,** **Defendant.**	**Civil Action No. 01-2437 (RJL/JMF)**

MEMORANDUM OPINION

In my prior opinion I left open the question of whether plaintiff should have access to defendant's reserves. Plaintiff never offers a more precise definition of the term, but we can begin with the proposition that reserves are the insurer's estimate of the pending losses to be paid on claims by its policy holders. Athridge v. Aetna Casualty & Surety Co., 184 F.R.D. 181, 192 (D.D.C. 1998), quoting Michael C. Thomsett, Insurance Dictionary at 121 (McFarland & Co. 1989).

If an insurer were to treat all of its premium revenue as income, without considering potential claims, it would produce inflated financial statements. Given the importance of insurance to risk management in a capitalist economy, "[i]t is critical to the regulation of the insurance industry that insurers maintain their reserves as accurately as possible. Understated reserves result in overstated income and net worth and exacerbate the risk of insolvency." Stephen S. Ashley, Bad Faith Actions Liability & Damages, § 10:31 (Oct. 2002). The setting of reserves is so important that their calculation may be subject to state regulation. See e.g. Cal Ins. Code § 923.5

Speaking theoretically, the maintenance of a reserve in a given situation might be construed as an admission that the insurer's liability is as least as great as the reserve. A reserve of $50,000 might be proof of bad faith if an insured claims that the insurer failed to offer to the victim of the insured's negligence a settlement of $25,000 or denied coverage and thereby subjected the insured to a judgment in excess of the policy amount. Thus, when such a bad faith breach of duty is claimed, reserve information may be discoverable. Athridge, 184 F.R.D. at 192-93 and cases cited therein; First Nat'l Bank v. Lustig, 1991 U.S. Dist. Lexis 15620, at *3-4 (E.D. La. 1991); Lipton v. Superior Court, 56 Cal.Rptr. 2d 341, 349-50 (Ct. App. 2d Dist. 1996).

When, however, the question relates to coverage, the reserve information could be considered an admission only if it qualifies as a concession by the insurer of potential liability despite its claim of no coverage. On the other hand, if other considerations drove the setting of the reserve or its amount was dictated by state law or tax considerations, its status as an admission becomes much more ambiguous and uncertain. Thus, the true question presented is whether the setting of the reserve amount can truly and fairly be described as a concession that the insured is at least liable in the amount of reserve, thereby undercutting the insurer's certain argument that coverage is unavailable.

To further complicate the matter, the reserve amount may have changed as the case progressed. The reserve amount in a case where the insurer has secured summary judgment in the lower court, but the insured has appealed, may have been entirely different from the reserve on the day the complaint was filed.

There also must be some allowance in the calculus for the societal interest in the accuracy of reserves at least in a jurisdiction where the state has not required their calculation. If reserve

information is always available and state law does not require its calculation, there is a risk that insurers will understate the reserve lest it be used against them. Whatever societal interest there is in the accuracy of reserves is foregone if insurance companies yield to the temptation to state them inaccurately, lest they be used as damaging admissions against their interests.

As if this was not enough, it would certainly seem that reserve calculations by claims adjusters qualify as work product under Fed. R. Civ. P. 26(b)(3). As that rule requires, they are prepared by the insured's agent and their *raison d'etre* is the existence of litigation against the insured or its anticipation.

Despite all these considerations, plaintiff has put very little meat on the bones. Plaintiff has not surveyed industry practices as to the setting of reserves, discussed whether or not there is some state law or regulation pertaining to any reserve set in this case, or sought by more narrow discovery to ascertain this defendant's policy and practices as to the setting of reserves. Finally, at the risk of getting ahead of ourselves, if, as seems inevitable, I were to conclude that information pertaining to the setting of the reserve in this case is protected by the work product privilege, it would be information plaintiff could get only by showing a substantial need for it. The need to get the reserve information is, however, to use it as an admission, and this only sends us back to where we started - a reserve figure is not an admission unless it is in fact an assessment of liability rather than the product of state law or regulation or driven by tax or other financial considerations. Finally, plaintiff's need is not substantial, but ordinary; everybody in litigation with an insurance company would like to secure reserve information to use against it. The policies in favor of protecting work product and accurate reserve figures easily trump such an insubstantial and common "need." I will not, therefore, compel it. See

Spearman Indus., Inc. v. St. Paul Fire and Marine Ins. Co., 128 F.Supp. 2d 1148 (N.D. Ill. 2001); Youell v. Grimes, 202 F.R.D. 643, 652 (D. Kan. 2001); American Protection Ins. Co. v. Helm Concentrates, Inc., 140 F.R.D. 448 (E.D. Calif. 1991); Leski Inc. v. Fed. Ins. Co., 129 F.R.D. 99, 114 (D.N.J. 1989); Champion Int'l Corp.v. Liberty Mut. Ins. Co., 128 F.R.D. 608, 611 (S.D.N.Y. 1989).

An Order accompanies this Memorandum Opinion.

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JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated:

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ORDER

In accordance with the accompanying Memorandum Opinion, it is, hereby,

ORDERED that Plaintiff's Motion to Compel [# 11] is **DENIED** as to the reserve information.

SO ORDERED.

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JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated: